No. 13155

In The

United States Court of Appeals

For the Ninth Circuit

R. E. OLSEN, et al., *Appellants*,

vs.

POTLATCH FORESTS, INC., a corporation, et al, *Appellees.*

CONSOLIDATED BRIEF OF APPELLEES

Appeal from the United States District Court, for the District of Idaho, Northern Division.

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STATUTES

No. 13155

In the United States Court of Appeals For the Ninth Circuit

R. E. OLSEN, et al., *Appellants*,

vs.

POTLATCH FORESTS, INC., a corporation; JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; INTERNATIONAL WOODWORKERS OF AMERICA, Affiliated With the Congress of Industrial Organizations, LOCAL No. 10-358, of the International Woodworkers of America, at Pierce, Idaho, et al, *Appellees*.

CONSOLIDATED BRIEF OF APPELLEES

Appeal from the United States District Court, for the District of Idaho, Northern Division.

POINTS RELIED UPON BY APPELLEES

1. The collective bargaining agreement involved in the present controversy providing for a "wage rate increase" to pay the cost of a Health and Welfare Pro-

gram was intended to and did create an employer-paid Health and Welfare Group Insurance Plan for the employees without right on the part of any employee to receive the amount of the increase in monetary wages or to control its disposition. (Appellants' Specification of Errors II, III.)

2. Such a Health and Welfare Plan is a proper subject of collective bargaining agreement under the terms of the National Labor Relations Act (29 U.S.C.A. Sec. 159 (a)). The method of financing such a plan, being an integral part of the plan itself, is a proper subject of collective bargaining. The union, as the collective bargaining representative of the employees, had the authority to enter into an agreement with the employer and to bind the individual employees within the bargaining unit irrespective of the wishes of the individual employees (Appellants' Specification of Errors I, IV, VI).

3. The payments to the insurance carrier provided for in the agreement do not violate Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C.A. Sec. 186) (Appellants' Specification of Error V).

ARGUMENT

1. The Agreement Provides for an Employer-Paid Health and Welfare Program.

The argument of counsel for appellants is based upon the major premise that the sum of 7½¢ referred to in subdivision (a) Article XVIII of the collective bargaining agreement is part of the wages or earnings of employees, and that the 7½¢ payments to the insurance carrier or hospital or physicians' organization, referred to in subdivision (c) of the same article, are deductions from these wages or earnings. Proceeding from this premise, counsel then contend that the wages cannot lawfully be withheld from the employee and by the employer paid to the insurance company designated by the union without signed authorization by the individual employees.

Analysis of Article XVIII of the collective bargaining agreement demonstrates that counsel's major premise is false. Wages in the ordinary concept of the term are not involved; rather there is before the court a method of providing a company-financed health and welfare plan, based upon an increase in wage rates. The pertinent language of Article XVIII reads:

> "Company Financed Health and Welfare
>
> "(a) A Company paid Health and Welfare program shall be financed as follows: Wage rates will

be increased seven and one-half cents (7½¢) per hour, effective June 1, 1950, as to employees on the payroll on the date this agreement is executed, for the purpose of financing and paying for an employee benefit program. * * *

"(b) Each employee included within the bargaining unit under this agreement, upon execution of this agreement in his behalf by the Union as his duly certified collective bargaining agent, hereby authorizes and directs the Company to deduct from his earnings each month the sum of 7½¢ for each hour worked by him or 60¢ per day for scheduled hourly employees and to pay said sum to such insurance carrier or carriers or hospital or physicians' organization legally authorized to do business in the state of Idaho as the Union or its authorized representatives may designate to be used exclusively for social benefits to inure to the benefit of the individual employee only. * * * No employee, or former employee, shall have any claim, right, interest in or demand to said 7½¢ or said 60¢, or any part thereof, or in the provisions of Article XVIII, except he shall receive the social benefits, insurance, medical and surgical coverage, and dividends or refunds as provided under the policy or policies issued by the carrier or carriers as a result of negotiations by the Union with the carrier or carriers. No employee or former employee shall have any right or cause of suit or action and none shall be maintained under the provisions of this working agreement or otherwise against the Company or the Union by reason of the provisions of Article XVIII.

"(c) Effective as soon as permitted by its present policies the Company shall forthwith terminate any existing employee social benefit programs to which the employee contributes. * * *"

Thus, by its very terms, the collective bargaining agreement creates a "Company Financed Health and Welfare" program. It does not provide for any deduction from existing wages to defray the cost of such program. Instead, the agreement in subdivision (a) provides for creation of a fund measured by a "wage rate increase" of 7½¢ per hour solely to finance the health and welfare plan. This increase in wage rate reflects the amount required to meet the cost of the insurance program. The language of subdivision (b) expressly and completely negatives any right of an employee to receive money as such; his only right is to have this additional 7½¢ applied exclusively on insurance premiums. Should the agreement fail in its purpose of providing employee social benefits, the employer would be under no obligation to provide 7½¢ as a wage increase, and the employee would be without recourse to collect such 7½¢. The "wage rate increase" is one in name only; in substance it is simply the measure to be used by the employer to provide out of its own funds a health and welfare program. The intent is clear that there is no need to obtain individual authorization by employees, and that there is no right of an individual to reject the insurance. Unless, for some reason, this intent is contrary to law, it must be given effect.

Counsel at page 9 of their brief quote from a portion of the Retirement Plan between Ford Motor Co. and the Union, stating that it is truly a "company financed" program. We agree that the language there used established a company financed program; we disagree with counsel's implication that the persons who drafted this plan had any monopoly on the use of English composition. Doubtless, many company financed programs have been drafted in this country by different persons, no two of the drafts having the same phraseology, yet all may have had the same legal effect. The record is silent as to whether any of the persons who drafted Article XVIII had any familiarity whatever with the phraseology of the Ford plan.

2. The Union and the Employer had Full Power Through Collective Bargaining to Establish the Health and Welfare Program and to Provide for the Earnings' Deductions and Insurance Payments.

In industries engaged in interstate commerce, the rights and duties of the respective parties in collective bargaining must be determined under the terms of the National Labor Relations Act as amended. The relevant sections of this Act are the following:

> "Sec. 9 (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate

for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." (29 U.S.C.A. Sec. 159 (a)).

"Sec. 8 (a) It shall be an unfair labor practice for an employer * * *

"5. to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 (a). (29 U.S.C.A. Sec. 158 (a) (5)).

"Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents * * *

"3. to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a)." (29 U.S.C.A. Sec. 158 (b) (3)).

These provisions firmly establish the principle of majority rule and the principle that the representative selected by the majority of the employees is the exclusive representative of the employees. The Union has the right and the duty to represent all of the employees in the bargaining unit, whether members of the Union or not, and the employer may not make individual arrangements with employees which are inconsistent with the collective bargaining agreement. Individual employees are not free to accept wages or conditions which are inconsistent with the collective bargaining agreement. These principles are announced in *J. I. Case v.*

N.L.R.B., 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 762, where the court held that a collective bargaining agreement invalidated individual contracts of employment which were valid in their terms and inception and entered into prior to the selection of the collective bargaining representative.

On page 3 of appellants' brief, counsel assert that a majority of the individual appellants are not members of the unions or locals herein mentioned. Such indeed is the allegation in appellants' answer filed in the District Court (Tr. of Rec. p. 23), but because no responsive pleading was required to that answer, the averment is taken as denied (Federal Rule 8d). No evidence to support the averment was ever introduced or tendered, and the Stipulation of Facts, on the basis of which the case was submitted, is silent respecting the subject. Hence, it is not established as a fact that a majority of the individual appellants were non-union men. The subject, however, would appear to be unimportant in view of the circumstance that under Sec. 9 (a) of the National Labor Relations Act, the collective bargaining representatives are the exclusive representatives for all employees in the bargaining unit and not merely all members of the Union who are in the bargaining unit. (In the instant case, the appellee unions had been certified by the National Labor Relations Board as the bargaining

agent of the production and maintenance employees of Potlatch Forests, Inc., Tr. of Rec. pp. 5 and 6).

The subject of insurance programs is one which the National Labor Relations Board and courts have expressly held to be a mandatory subject for collective bargaining. *Inland Steel Co. v. N.L.R.B.* 170 F. (2d) 247 (C.A. 7th Circuit, 1948); *Cross & Co. v. N.L.R.B.*, 174 F. (2d) 875, (C.A. 1st Circuit, 1949). It follows that a union has the authority to negotiate for such a plan and to enter into an agreement with the employer to put that plan into effect. It also follows that the method of payment for such a plan, i.e., whether directly by the employer or directly by the employee or by the employer from the employees' money, is a proper subject of collective bargaining.

The union, as the collective bargaining representative, clearly had the power to establish an insurance program or to seek any other improvement in working conditions regardless of whether this might require the use of funds that might be available for a monetary wage increase. In fact, an employer and union may properly negotiate for a change in conditions which adversely affects the established interests of certain of the employees, provided it is done in good faith and not fraudulently. In a number of recent cases it has been held that seniority rights of individual employees are

inferior to and may be altered by a change in the collective bargaining agreement. Thus, in *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 93 L.Ed. 1513, the court held that seniority rights given to a veteran by Sec. 8 of the Selective Training and Service Act of 1940 were not infringed by act of the employer in laying off the veteran prior to laying off union chairmen, although junior to the veteran, where a new collective bargaining agreement made while the veteran was in military service provided that thereafter employees who served as union chairmen were entitled to be retained in case of lay-offs, regardless of their length of service in the plant. See also: *Leeder v. City Service Oil Co.*, 189 P. (2d) 189 (Okla.); *Hartley v. Brotherhood of Ry. & Steamship Clerks*, 283 Mich. 201, 277 N.W. 885; Teller, "Labor Disputes and Collective Bargaining," 1950 Supplement, page 509, Note 13.

If the union may, through collective bargaining with the employer, actually impair valuable seniority rights of individual employees, it would all the more clearly follow that, in a case where the employer has provided a wage increase to pay for a Health and Welfare Program for the employees, the right of the union to impose this plan upon the employees could not be questioned.

It is submitted that the union in the present case had ample authority to bind all individuals in the bargaining unit with respect to the provisions for insurance benefits. This is simply an application of the principle of majority rule. It would be surprising if all employees, whether union or non-union, agreed with all of the terms of the collective bargaining agreement. The application for insurance recites: "Total Number of persons to be covered—48,000, of whom 48,000 are eligible." (Tr. of Rec. p. 144.) In the instant case, 109 out of approximately 3,000 Potlatch employees (3,164 employees in June, 1950), are objecting to the plan (Tr. of Rec. pp. 33, 35, 36). To permit such a small minority of one company's employees to insist upon and seek terms and conditions of employment different from those provided in the collective bargaining agreement would undermine the collective bargaining agreement, and violate the purposes of the Labor Management Relations Act.

3. The Agreement Does Not Violate Section 302 of the National Labor Relations Act.

Counsel for the appellants at pages 8-11 of their brief assert that the earnings' deduction provisions of the collective bargaining agreement are in violation of 29 U.S.C.A. Sec. 186. Little argument is presented in sup-

port of this contention. Nevertheless, to the end that the court may be fully advised, we shall discuss the statute in relation to the facts of the instant case.

Section 186 of Title 29 U.S.C.A. is Sec. 302 NLRA, as amended by LMRA, 1947. Its applicable provisions read:

> "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> "(c) The provisions of this section shall not be applicable * * * (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents * * * *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pen-

sions on retirement or death of employees, * * * or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; * * *".

It will be noted that subdivision (a) of Sec. 186 above quoted provides that it shall be unlawful for any employer to pay or deliver or agree to pay or deliver any money or other thing of value to any representative of his employees; subdivision (b) of the same section makes it unlawful for any representative of any employees to receive or accept or agree to receive or accept from the employer any money or other thing of value. In the instant case the 7½ cents deduction does not involve any payment by the employer to a representative of his employees; rather the payment is made to the insurance company which, through its group insurance policy, is providing health and welfare benefits for all of the employees. The union does not and cannot receive any of the payments made to the insurance carrier (Tr. of Rec. p. 145).

In *Rice-Stix Drygoods Co. v. St. Louis Labor Health Institute*, 15 Commerce Clearing House Labor Cases, par. 64,727, 22 Labor Relations Reference Manual, (Bureau of National Affairs) 2528, (U.S.D.C., E.D. Mo., 1948), a union and an employer had entered into an agreement after the effective date of the Labor Manage-

ment Relations Act providing in part that the employer would pay to the Institute a sum equal to 3½ percent of the gross pay for all full-time regular employees. The Institute was a corporation organized under Missouri laws relating to benevolent, etc. organizations, engaged in the function of caring for the health of its members who included both union and non-union employees. It was a practice for labor unions to enter into contracts with employers, whereby the latter agreed to pay to the Institute a certain percentage of the wages of the employees in the bargaining unit represented by the union as membership dues. The only interest an employe, employer or labor union had in the Institute was limited to medical and health services. Action was brought by the employer in the above court after an employee had directed the employer to stop making these payments to the Institute and to pay the money to him. The court entered its Conclusions of Law: "That none of the moneys paid to the St. Louis Labor Health Institute are paid to any representative of any employees of any employer as set forth in Section 302 of the Labor Management Act of 1947," and that the payments "are valid and in no way a violation" of that Act.

Moreover, it cannot be successfully contended that since payment to the insurance company in the instant case is on direction of the union, such payment is in fact

a constructive payment to the union of money or a thing of value. Sec. 186 is a criminal statute. It is silent with regard to constructive payments. Statutes creating and defining crimes cannot be extended by intendment. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. 14 Am. Jur. p. 774, Sec. 19.

Sec. 186 was obviously intended to prevent bribery of union representatives and extortion by them, and the placing in their hands of funds which they could use indiscriminately for any purpose they should see fit.

Subsection (c) of Sec. 186 is a statement of certain exceptions to the broad prohibitions set forth in subdivisions (a) and (b). The obvious purpose of subdivision (c) was to make sure that subdivisions (a) and (b) did not prevent the making of certain payments which were thought to be proper. In light of our above comments with respect to the construction of criminal statutes, the conclusion necessarily follows that criminal conduct, outlawed by subsections (a) and (b), cannot be enlarged by implication.

The language of Sec. 186 (c) (5) cannot be said either directly or by implication to prohibit the kind of payments involved here. In the first place, there is no trust fund established by the union in the present case.

The union under the terms of the collective bargaining agreement is in no way entitled to any of the money and in no way acquires any kind of a property interest in it. For the establishment of a trust fund the settlor of the trust must have a transferable interest of title in the corpus of the trust. 54 Am. Jur., "Trusts," Sec. 32, p. 44.

Furthermore, there is nothing in Section 302 (c) (5) which requires health and welfare benefits to be provided solely by means of a trust fund established by the union. There is no suggestion that it is in any way improper for an employer to make contributions to a health and welfare program where the contributions are made to an established insurance company and the program is administered by that company.

There is no requirement that with respect to health and welfare funds the individual employees must consent to deductions being made. It is important to note that clause (5) of subsection (c) dealing with trust funds is in juxtaposition to clause (4) of the same subsection dealing with check-off of union dues, in which case the employer is required to obtain a written assignment from his employees. The absence of such a requirement with respect to money paid into trust funds appears to have been deliberate.

Since, as has been pointed out above, the health and welfare insurance plan for the sole benefit of employees is a proper subject for collective bargaining under 29 U.S.C.A. Sec. 159 (a), it follows that the parties would also be at liberty to bargain with respect to the method of financing the plan—whether payments should be made by the employer solely, or in some other manner as determined by the agreement.

Counsel, at page 8 of their brief, quote from the Majority Report of the Joint Congressional Committee on the Taft Act December 31, 1948, in which it is said: "Sec. 302 (29 U.S.C.A. 186) was written largely to prevent the payment into welfare funds of monies earned by employees, calling for compulsory deductions, the proceeds often completely at the disposition of labor unions."

It is not clear upon what theory counsel contend that this report, issued a year and a half after passage of Sec. 302 (29 U.S.C.A. 186), can be supposed to control the court in the exercise of its judicial function of construing the applicable statute. (See *Commissioner of Internal Revenue v. Rabenold*, CCA 2nd Cir., 108 F. 2d 639, 641). Counsel do not even contend that the Act is uncertain in its language.

However, the quoted language of the report is consistent with the validity of Article XVIII. As appears from the foregoing analysis of 29 U.S.C.A. 186, the prohibitions of the Act are directed against payments by the employer to representatives of his employees. In the instant case the payments are to an independent, long-established insurance company which, in the course of its business as such, has written a policy of group insurance providing health and welfare benefits for all of the employees.

There are here involved no "proceeds often completely at the disposition of labor unions." The monies remain with the employer until paid over as premiums to the John Hancock Company. Under the agreement, these monies can be used for no purposes other than as premiums to the insurance company and the hospital and physicians' organization. No contention is made that the funds are being used for any purpose other than as provided in Article XVIII.

Finally, it has been abundantly established that the funds involved belong to the employer, not to the employees. Therefore, this is not a case of "the payment into welfare funds of monies earned by employees, calling for compulsory deductions." Counsel for appellants have expressly disavowed any contention that the company employer cannot negotiate with the union for the

purpose of providing out of company funds a health and welfare program (Br. of Appellants, p 7).

CONCLUSION

In two unreported decisions of trial courts involving the identical health and welfare program, certified copies of which are on file with the clerk of this Court of Appeals, contentions of the nature advanced by appellants' counsel herein were overruled. One of these decisions, rendered July 25, 1951, is that of the Honorable Chase A. Clark, District Judge from whom the instant appeal is taken (Appendix A hereto). Judge Clark in part said:

> "I cannot agree with the defendant employees that a portion of their wages is being taken away. In the first instance there was a provision for an increase for the specific purpose of financing the employees benefit program. It may be referred to, and probably was, as an increase in wages, however, there was an understanding between the employer and the bargaining agent that the amount of increase in this instance was to finance the said program. The complaining employees have sustained no loss in wages by reason of the contract, on the contrary they have gained all the benefits provided by the Employees Benefit Program. They cannot now say they are entitled to wages in lieu of such benefits."

The other decision, rendered April 27, 1951, is that of the Honorable John E. Murray, Judge of the Superior Court of Washington for Lewis County, case No. 21149 entitled "Timber Operators Association v. District Council No. 3, International Woodworkers of America, et al" (Appendix B hereto). This decision is of particular significance because although the health and welfare program involved was the same as that in the Potlatch case, the collective bargaining agreement was less explicit in its phraseology than that in the Potlatch case and was far removed in its language from that used in the Ford Employment Plan. Nevertheless, Judge Murray among other things said:

> "It is true the item is referred to as wages, and in the broad sense can be so construed. Yet as a part of the collective bargaining agreement it was not intended as an unqualified wage increase separate and apart from the group insurance program. It was not intended that this increase be wages for an employee to draw if he did not want insurance. It was to be used for insurance where there was no employee benefit plan. Where there was an employee benefit plan in effect the employer would receive credit for his contribution thereto and the increase would be the difference. It does not seem to me that this violates Sec. 302 of NLRA as amended by NLMA in 1947."

We respectfully submit that the decree of the trial court herein should be affirmed.

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APPENDIX A

In the United States District Court for the District of Idaho, Northern Division

POTLATCH FORESTS, INC., *Plaintiff*,

vs.

INTERNATIONAL WOODWORKERS OF AMERICA, affiliated with the Congress of Industrial Organizations, et al., *Defendants*.

MEMORANDUM

No. 1808

This matter was submitted to the Court on a stipulation of facts entered into by all the parties who appeared in the action. The stipulation of facts was filed on April 25, 1951, and thereafter briefs were filed and presented to the Court on behalf of all parties in the action.

A study of the stipulation of facts and briefs of respective counsel was made by the Court.

Briefly stated, it appears from the stipulation that the Potlatch Forests, Inc., is a corporation existing under the laws of the State of Maine, and authorized to do business in the State of Idaho, and is engaged in interstate commerce within the meaning of the National Labor Relations Act. That the International Woodworkers of America and its affiliated locals have been desig-

nated and certified by the National Labor Relations Board as the sole and exclusive bargaining agent of the production and maintenance employees of the Potlatch Forests, Inc. It appears that a certain collective bargaining agreement was entered into between the plaintiff and the defendant Union covering all of the production and maintenance employees of the plaintiff. Among other things the agreement provided for a certain increase in wage rates for the purpose of financing and paying for an employees benefit program. Thereafter the plaintiff deducted from each and every maintenance and production worker certain amounts to pay for the above mentioned benefit program. The Union as bargaining agent entered into a contract with the John Hancock Mutual Life Insurance Company for group insurance covering said employees and thereafter under the instructions of said Union, the plaintiff paid out certain moneys to certain physicians and to the said Insurance Company according to the terms of the said benefit program.

On or about the 6th day of September, 1950, plaintiff was served with a demand signed by 109 of its employees, defendants herein, requesting that no further deductions be made from their earnings for the health and welfare program and that said sums heretofore deducted be returned to them immediately.

The plaintiff filed a complaint for a declaratory judgment.

It appears to the Court under the National Labor Relations Act, that the plaintiff as an employer is required to bargain with the Union designated as the bargaining agent, with respect to rates of pay, wages, hours of employment and other conditions, which conditions include a company financed health and welfare program.

From a study of the Act involved and the numerous cases involving this and like questions, it appears to the Court that the Union, once selected as the bargaining agent, has the authority under the act to enter into trade agreements setting up benefits such as group insurance, such agreement may provide for the deductions necessary to finance such benefits. I cannot agree with the defendant employees that a portion of their wages is being taken away. In the first instance there was a provision for an increase for the specific purpose of financing the employees benefit program. It may be referred to, and probably was, as an increase in wages, however, there was an understanding between the employer and the bargaining agent that the amount of increase in this instance was to finance the said program. The complaining employees have sustained no loss in wages by reason of the contract, on the contrary they have gained

all the benefits provided by the Employees Benefit Program. They cannot now say they are entitled to wages in lieu of such benefits.

The Court is of the opinion that the request of the plaintiff for declaratory judgment as contained in its complaint should be granted and counsel for the plaintiff is directed to prepare the necessary findings of fact, conclusions of law and judgment, serve copy on opposing counsel and submit the original to the Court for its consideration. Dated July 25, 1951.

APPENDIX B

In the Superior Court of the State of Washington for Lewis County.

TIMBER OPERATORS ASSOCIATION, a non profit corporation, *Plaintiff*,

vs.

DISTRICT COUNCIL NO. 3, INTERNATIONAL WOODWORKERS OF AMERICA; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-2; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-30; DISTRICT COUNCIL NO. 2, INTERNATIONAL WOODWORKERS OF AMERICA; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 2-90; WILLIAM CRAWFORD, CLAUDE BURGESS, J. B. RUSSELL, KARLY LARSON and

A. M. KELLY, REX McCARTY and DONALD RAND, *Defendants.*

MEMORANDUM OPINION

No. 21149

This is an action in equity brought under the Declaratory Judgment Act by the Timber Operators Association, an association of employers engaged in logging in Southwestern Washington, against labor unions which represented employees in collective bargaining and certain officers of the unions.

The issues are presented upon a complaint, answer and cross-complaint, and reply, together with a stipulation entered into by the parties and signed by the Court as a pre-trial order, together with some oral testimony covering several matters not admitted in the pleadings or pre-trial order. The pre-trial order was made upon the understanding that any of the parties to the action could object to the materiality and relevancy of any matters therein stated.

The plaintiff moved to strike from the pre-trial order the following paragraphs or subdivisions: From paragraph VII, subdivisions 4 to 21, inclusive, beginning on page 5 and continuing to the end of paragraph VII, on page 9. Plaintiff also objects to paragraphs VIII, IX, X,

X-a, XI, XII, XIII, XIV, XVI, and XVII. The objections made by the plaintiff are to relevancy and materiality.

There seems to be no question about the happening of the events or the correctness of the facts set forth in those paragraphs. Plaintiff claims they are irrelevant and immaterial because the contract in issue is clear and not ambiguous; that those paragraphs set forth the circumstances under which the contract was arrived at and cover mostly negotiations with groups other than the plaintiff; that they constitute only background and preliminary negotiations which were all merged into subsequent contract.

Respective counsel for plaintiff and defendants agree that the contract is clear and unambiguous, yet reach opposite conclusions as to its meaning.

Taking the contract as a whole, rather than a group of isolated and independent paragraphs, it furnishes a basis, apparently, for arriving at different conclusions. It is capable of being understood in two possible senses, and therefore ambiguous. On the other hand, even if not ambiguous, as both sides contend, it seems to me the circumstances and negotiations leading to the final agreement in this case will assist the Court by placing it in the situation of the parties. The Court can then view the transactions as the parties did and be able to

determine the correct interpretation of the language used and the matters really agreed upon.

The motion to strike should be overruled.

STATEMENT

The plaintiff seeks a declaratory judgment and injunction. The purpose is to prevent the enforcement against plaintiff and its members and other employers in the State of Washington of a provision in the collective bargaining agreements between the employers and the defendant unions and others.

The defendant International Woodworkers of America (IWA) charters local unions and district councils composed of local unions within geographic areas. The local unions chartered by the IWA are located throughout the states of Washington, Oregon, Northern California and Northern Idaho. Workers who are members of these local unions are employees engaged in the logging and lumbering industry and plywood manufacturing.

The complaint is stated in two counts. One relating to the collective bargaining agreement between plaintiff, acting for certain of its members, and defendant District Council No. 3 of the IWA, acting for defendant Local Unions 3-2 and 3-20; the other relating to collec-

tive bargaining agreement between plaintiff and defendant Local Union 2-90. The provision or clause involved in each count is identical and the same issue is presented for determination, and I believe both causes of action can be treated as one.

At a conference of representatives of various local unions situated throughout the Northwest, the decision to demand an employer paid health and welfare program was reached. Thereafter notices were given to the various employers requesting amendment and revision of the union working agreement. The unions, through their respective district councils, authorized a committee of the international union, commonly known as the Northwest Regional Negotiating Committee, to represent the various local unions in negotiations with the employers engaged in the logging and lumbering industry.

During the month of January 1950, District Council No. 3 IWA and Local Union 2-90 notified the plaintiff of a desire to make revisions and amendments to the working agreement then in existence, in the following particulars, as shown by Exhibit "C" to the pre-trial order, which, in so far as pertinent here, may be summarized as follows:

HEALTH AND WELFARE

Employer—aid health and welfare program covering:

1. $3,000 life insurance plus $3,000 for dismemberment and/or accidental death.
2. Full hospital, medical and surgical coverage.
3. $40.00 a week benefits for 26 weeks for sickness and injuries off the job. Payments to begin with the 4th day resulting from sickness and with the first day resulting from injury.
4. While a worker is drawing workmen's compensation he shall be paid a sum equivalent to the difference between Workmen's Compensation and $40.00 per week.

The notice also made reference to paid holidays, but those matters are not in dispute.

The employers whose employees are members of and represented by the various IWA local unions met with the union committee, through various employer associations, in Portland, Oregon, to carry on negotiations involving the proposed contract revisions and changes. The conferences or discussions between committees of employers and of unions had no authority to bind, but could only make recommendations to their respective principals for consideration and approval or rejection.

Negotiations began in February 1950 and continued until April 1, 1950, at which time the employers refused to grant an employer paid health and welfare program and the union committee decided to take a strike vote. This vote was taken and strike deadline fixed for May 15, 1950.

On May 11th and 12th the union committee and committees of employers of Willamette Valley Lumber Operators Association (WVLOA) agreed upon a joint recommendation. Also at about the same time the union committee and Lumbermens Industrial Relations Committee (LIRC) agreed upon a joint recommendation which included the following provision as a part of paragraph 2:

> "If the foregoing is found to be in conflict with any federal or state law, the parties agree to amend it so as to conform to the same."

This provision was also added to the settlement reached with the WVLOA.

On May 13th the plaintiff met with the union committee in Portland, at which time they likewise agreed upon the same joint recommendation as agreed to by WVLOA and LIRC. The joint recommendation (Ex. "B" to complaint) is as follows, in so far as important in this case:

"To settle all issues before them for negotiations, the Northwest Regional Negotiating Committee, I.W.A. and Timber Operators Association recommend for acceptance to the Local Union and the Company or Companies respectively represented by each, the following:

"1. All employees covered by this agreement shall receive a wage increase of 7½¢ per hour effective May 1, 1950, and the wage scale shall be revised accordingly.

"2. There shall be included in each working agreement where there is no existing employer benefit plan in effect between the Local Union and Employer, the following clause:

" 'Upon execution of this agreement in his behalf by Union, each employee covered by this agreement authorizes and directs Employer to deduct from his earnings each month the sum of not more than 7½¢ for each hour worked by him and pay said sum to such insurance carrier or carriers as the Union or its authorized representative may designate for employee social benefits. Such sum shall be paid on the statement of the insurance carrier or carriers so designated. Employer will cooperate with the insurance carriers in securing necessary information for coverage.'

"If the foregoing is found to be in conflict with any federal or state law, the parties agree to amend it so as to conform to the same.

"3. Where an employee benefit program is now in effect in an operation, Employer shall receive credit for his contribution to such program, and said program may be supplemented to the extent set forth in the above.

"4. * * * * *.

"5. Employee social benefit issues shall be closed until April 1, 1952."

The plaintiff by letter of June 22nd indicated that the joint recommendation was accepted, but insisted, however, that before the employers could lawfully make the deductions there must be a written authorization from each employee. (Ex. "C" to complaint)

July 27th defendant District No. 3, representing Local 3-2 and Local 3-30, reported to plaintiff that the recommendations of May 13th had been accepted by the membership and the unions involved. On July 13th Local Union 2-90 also informed plaintiff of acceptance of the May 13th recommendation.

The International Woodworkers of America-CIO on July 1, 1950, entered into a group insurance contract with the John Hancock Mutual Life Insurance Company covering all employees within the bargaining units represented by the defendants herein and other local unions chartered by the said International Woodworkers of America, said group insurance being for life, accident and health insurance.

The defendants assert that since the trial of this action the basic group insurance policy has been

changed. At the time of the trial it contained the following provision:

> "Annual Surplus Distribution. On each policy anniversary to which premiums have been paid, there shall be distributed hereon such share of a divisible surplus as may be apportioned hereto by the company. Any such divisible surplus shall be paid in cash to the union or at the election of the union may be applied in abatement of premium payments."

On February 3, 1951, International Woodworkers of America-CIO executed and forwarded to John Hancock Mutual Life Insurance Company an instrument that irrevocably assigned all of the interest in any dividends due or payable under the group policy or otherwise, including specifically any divisible surplus referred to in the above quoted paragraph, to the insurance company. It also directed the insurance company to credit such dividends to the gross advance premium account, for application in accordance with the special administrative provisions of the policy pertaining to moneys credited to said gross adavance premium account. For the purpose of this decision it will be assumed that such change has been made.

The principal issues appear to be:

1. What is the meaning of the contract of May 13, 1950?

2. Does collective bargaining authority include right to obtain an increase in wages and direct the application thereof to pay for group insurance for employees?

3. Would employer be guilty of violating the rebate statutes (R.R.S. 7612-21 to 7612-25) in making the deductions agreed upon without individual written consent of employees?

4. Did the union as bargaining agent exceed its authority?

5. Does the NLRA violate the constitution in that it permits the taking of employees' property without due process of law?

1. What is the meaning of the contract? The plaintiff and defendants, previous to the contract here involved, had working agreements covering wages, hours, holidays and other details. (Ex. "A" to complaint.) The defendants sought a revision and amendment of the working agreements to include "Employer paid Health and Welfare Provision." The committees negotiated for several months on the question. The unions showed that the proposed health and welfare insurance program would cost $12.41 per month per man, or 7½¢ to 8½¢

per hour (p-t.o., p. 6). The employers refused to comply with the union demands, but made a number of counter proposals for employer paid group insurance (p-t.o., p. 7). The counter proposals of the employers were rejected because the unions insisted that the benefits were not adequate. Finally, the employers agreed to raise the wages 7½¢ per hour per man and pay it to an insurance carrier or carriers authorized or designated by the unions. On May 12, 1950, the union arrived at a settlement with the WVLOA and the LIRC. On May 13th the plaintiff and the union committee also made a settlement in the nature of a joint recommendation, which, by approval of the interested parties, became the contract here involved (p-t.o., Ex. 1).

It clearly appears that the unions were negotiating for an employer paid health and welfare program; that the employers made counter proposals of employer paid insurance, which were rejected. Finally, whether or avoid the work and responsibility of administering the insurance program or because they believed the plan unworkable or illegal or prohibitive in cost, the employers rejected the union proposal and agreed to the joint recommendation hereinabove set forth.

Upon considering the entire joint recommendation or contract, it seems to me the parties agreed upon a settlement of all issues before them by a wage increase

to pay for an employee benefit group insurance program.

2. Does collective bargaining authority include right to obtain increase in wages and direct the application thereof to pay for employee group insurance?

The parties agree that under the National Labor Relations Act and National Labor Management Act the unions here are the exclusive bargaining agents of their respective units "in respect to rates of pay, wages, hours of employment or other conditions of employment* * *." 29 U.S.C.A. 159 (a).

The parties also agree that bargaining in respect to group insurance is mandatory and comes within the "wages," "rates of pay" and "other conditions of employment."

It also seems to be agreed that an employer paid group insurance plan would be legal in every respect.

The remaining question, the one stated at the head of this discussion, is the one in dispute. The plaintiff insists that the payment is from wages of employees and unlawful. The defendants argue that the program is really an employer paid one.

29 U.S.C.A. 186 (Sec. 302 NLRA as amended by NLMA 1947) makes it unlawful for an employer to pay

or deliver anything of value to a union, and likewise makes it unlawful for the union to agree to accept anything of value.

"(c) The provisions of this section shall not be applicable

"(4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment * * *;" or

"(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer and their families and dependents * * *: Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees * * *, or unemployment benefits or life insurance disability and sickness insurance, or accident insurance."

There is nothing in this act which indicates that congress had any objection to an insurance plan paid from funds wholly contributed by the employer. There is nothing in the act indicating that deductions from employees' wages for the purpose of paying insurance are prohibited. This section does limit the type of de-

ductions for union dues and it also limits the type of trust fund that may be established for benefit of employees, but says nothing limiting the type of deductions that could be made in setting up a group insurance plan for the sole benefit of employees. Since such a plan is a proper subject for collective bargaining, surely it would permit bargaining to finance the same, whether it be paid by the employers solely or whether it be paid under an agreement providing for a wage increase to take care of it. This latter plan may be difficult to distinguish from an employer paid group insurance program, particularly where the agreement provides for the increase in pay and a corresponding deduction to take care of it where there is no existing employee benefit insurance plan. It is true the item is referred to as wages, and in the broad sense can be so construed. Yet as a part of the collective bargaining agreement it was not intended as an unqualified wage increase separate and apart from the group insurance program. It was not intended that this increase be wages for an employee to draw if he did not want insurance. It was to be used for insurance where there was no employee benefit plan. Where there was an employee benefit plan in effect the employer would receive credit for his contribution thereto and the increase would be the difference. It does not seem to me that this violates Sec. 302 of NLRA as amended by NLMA in 1947.

The plaintiff contends that the union is interested because under the terms of the group policy with the John Hancock Mutual Life Insurance Company, (Defendants' Ex. "C") Section T General Provisions at page T-14 provides in paragragh 8 that any divisible surplus on the policy shall on each policy anniversary be paid in cash to the union, or at the election of the union may be applied in abatement of premium payments. As heretofore stated, this objection is not being considered because since the case has been heard, so defendants' brief recites, the union has irrevocably assigned all its rights to dividends or divisible surplus to the insurance company, with the direction that such amounts be credited to gross advance premium account. While I appreciate this had not been done at the time of trial, if there is any question about the interest of the union in such "annual surplus distribution" I will hear further evidence in that regard. If the union receives benefits from the insurance contract it would amount to a violation of Sec. 302 of NLMA as amended in 1947.

3. Would employer be guilty of violating the rebate statutes (R.R.S. 7612-21 to 7612-25) in making the deductions agreed upon without individual written consent?

The above sections of the statute deal with rebates and make it a misdemeanor for a violation thereof. A

criminal statute must be strictly construed and nothing can be added thereto by intendment or construction.

State v. Youngbluth, 60 Wash. 383; 11 Pac. 240.
Huntworth v. Taylor, 87 Wash. 670; 152 Pac. 543.
State v. Yelle, 4 Wash. 2d 327; 103 Pac. 2d 372.

R.R.S. 7612-21 provides substantially as follows:

That it is unlawful for any employer (1) to receive a rebate from any employee of any portion of his wages; (2) to wilfully deprive the employee of any part of his wages by paying him a lower sum than agreed upon; (3) to make false entries in employer's books regarding the wages; (4) for an employer or one keeping employer's books to wilfully fail to show openly and clearly any rebate or deduction that may be made from employee's wages; (5) shall wilfully receive or accept from any employee any false receipt for wages. A violation of any of these provisions is a misdemeanor.

In applying the facts of this case to the above section there is certainly no indication that the employer received any benefit by reason of the deductions, nor is it contemplated that any false entry or record be made or that any false receipt be taken from the workman. The deductions are to be made openly, under a collective bargaining agreement to do so, and to be paid to an insurance company solely for the benefit of the employee.

R.R.S. 7612-22 provides substantially that it shall not be unlawful for an employer to withhold a portion of the employee's wages when required or authorized to do so by state or federal law, or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee, nor shall it be unlawful for an employer to withhold deductions for medical, surgical or hospital care pursuant to any rule or regulation. "Provided, That the employer derives no financial benefit from such deduction and the same is openly, clearly and in due course recorded in the employer's books."

R.R.S. 7612-21 does not in any way prohibit a deduction under a collective bargaining agreement to pay for insurance for the employee. And the provision of 7612-22 which enumerates certain things for which the employer may lawfully make deductions does not necessarily prohibit others. This being a criminal statute, it must be strictly construed, and since there is nothing in 7612-21 to prohibit the deduction for employee's benefit for insurance, certainly the failure to list that as a lawful deduction in the next section could not by inference or by construction make it a crime.

Under the collective bargaining agreement the employee receives all that was agreed upon, the employer

receives no rebate in making the deduction and there is no wilfulness or wrong in making the deduction and paying it for the purposes agreed upon.

4 and 5. Plaintiff further insists that the union exceeded its authority as a bargaining agent in that it could not enter into an agreement whereby a portion of the employee's pay was to be used for insurance and, further, that a law authorizing such an agreement would be unconstitutional in that it takes the property of the employee without due process of law.

The conclusions hereinabove reached make it unnecessary to discuss extensively these two propositions. The union, as a collective bargaining agent, had authority to deal with employer in obtaining group insurance; also, in so doing it was clearly within such authority to enter into a trade agreement for an increase in pay to take care of the insurance and direct the application or deduction of such amount of the increase as may be proper to pay the cost thereof.

It seems to me that under the collective bargaining authority the unions and employers can make a trade agreement setting up a plan for group insurance and providing the payment thereof by an increase in the wage scale and in the same agreement authorize deductions. Nothing is being taken from the workman. On the other hand, the bargaining agent has obtained from

the employer an increase for a particular purpose and directs the application of a portion thereof to the payment of insurance. The increase in pay and the group insurance all refer to and are included within the term "wages or other conditions of employment." For those who are not yet in the employ the trade agreement stands as a schedule of basic rights, and upon the individual employment agreement being made he is covered by it. As to the one who was employed at the time, nothing has been taken away. He has been benefited by the addition of group insurance and a corresponding increase for the purpose of paying therefor.

This memorandum has already grown to unusual length and the cases cited in the briefs have not been discussed, but I believe that sufficient recitals and statements have been made to show the basis upon which my conclusions are founded.

Finally, it is my conclusion that the bargaining agreement is a valid one and constitutes what may be called a working agreement or trade agreement; that any person then an employee or later becoming an employee is bound thereby, and the employer under such bargaining agreement has authority to deduct such amount as may be necessary to pay for the group insurance, but not to exceed 7½¢ per hour per man, and forward the same to the insurance company. It is further

my conclusion that in doing so the employer does not in any way violate either federal or state law, nor do the employees. Further, it is my conclusion that the union as bargaining agent had authority to enter into the agreement; that the agreement does not in any way violate the constitutional rights of the employee.

The insurance became effective as of July 1, 1950. It seems to me no deductions could be properly made before the date upon which the policy became effective.

The prayer of the plaintiff's complaint should be denied and a decree should be entered herein in accordance with the prayer of the defendants' answer.

Dated April 27th, 1951.

JOHN E. MURRAY,
Judge.

(No appeal was taken from the decree of Judge Murray entered pursuant to the above decision.)